2001

Fred N. Hobson v. Panguitch Lake Corporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

FRED N. HOBSON, et ux,
Plaintiffs and Respondents,

- vs -

PANGUITCH LAKE CORPORATION, et al,
Defendants, Third-Party Plaintiff and Appellant,

- vs -

DERRAL CHRISTENSEN, et ux and et al,
Third-Party Defendants, Fourth-Party Plaintiffs and Respondents,

- vs -

DELLA D. MARSDEN, et al.,
Fourth-Party Defendants and Respondents.

Case No.
13615

APPELLANT'S BRIEF

APPEAL FROM THE ORDER OF THE SIXTH JUDICIAL DISTRICT COURT FOR GARFIELD COUNTY, STATE OF UTAH
Honorable Ferdinand Erickson, Judge

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DELLA D. MARSDEN, et al.,
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STATEMENT OF CASE

The Plaintiffs/Respondents sue to quiet title in a parcel of real property in the possession of Defendant/Appellant who counterclaims against Plaintiffs seeking to quiet title to the disputed property in it.

Defendant/Appellant also filed a Third Party Complaint against Third Party Defendants for damages for breach of covenants in a Warranty Deed conveying the

property to it and for attorney's fees and costs incurred in defending title to the property. Third Party Defendants filed a Fourth Party Complaint against Fourth Party Defendant/Respondent for breach of covenants contained in a Warranty Deed to them and seeking the same relief as that claimed against them.

Hereafter the parties will be referred to as they appear in the District Court.

DISPOSITION OF CASE IN THE LOWER COURT

The District Court found in favor of the Plaintiffs and held that there had been an oral agreement between Plaintiffs and William Marsden, the husband of the Fourth Party Defendant, establishing the boundary line to the disputed property.

The Court also ruled that the Defendants could recover from the Third Party Defendants for the loss of the disputed property with the amount to be determined by the agreed price per acre at the time of the conveyance rather than at the time of the breach. The Court entered a similar award in favor of the Third Party Defendants and against the Fourth Party Defendant.

The Court denied the claims for costs and attorney's fees sought by the Defendant against the Third Party Defendants.

NATURE OF RELIEF SOUGHT ON APPEAL

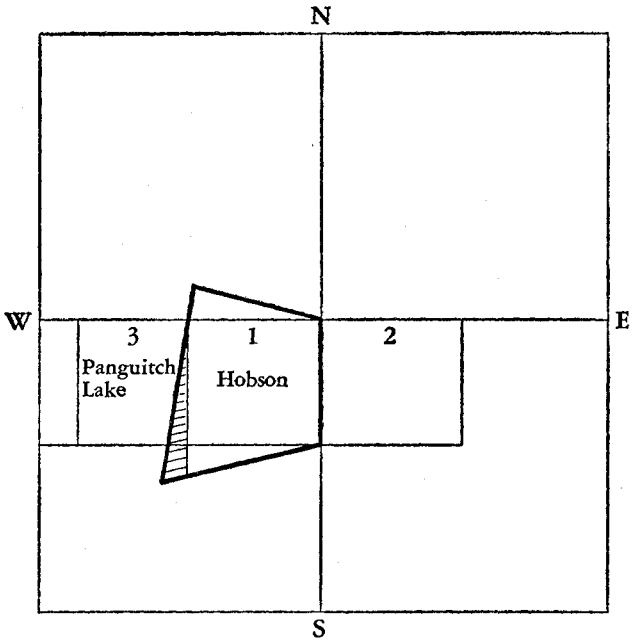
Defendant seeks to have the judgment of the Trial Court reversed and title to the disputed property quieted in it.

Defendant also seeks to have the Judgment of the Trial Court reversed which denied its claim for costs and attorney's fees against the Third Party Defendants.

STATEMENT OF FACTS

This action involves a dispute between Plaintiffs and Defendant concerning the ownership of a parcel of land located in Garfield County, State of Utah. The following diagram shows the property in question and the disputed area is designated by the diagonal lines.

Section 31, T 35 South, R 7 West



Prior to 1957 all of tracts 1, 2 and 3 were owned by the Fourth Party Defendant Della D. Marsden and her husband William Marsden who had acquired the property from Mr. Marsden's father. (R. 297) However, on November 1, 1957 William Marsden deeded tract 3 which includes the disputed area to his wife, the Fourth Party Defendant, Della D. Marsden, along with other property. A certified copy of the Deed is at R. 122, and referred to in Finding of Fact No. 3 at R. 92.

On the 2nd day of September, 1958, the Fourth Party Defendant Della D. Marsden entered into a contract with Plaintiffs to sell them the property referred to as tract 1. (Exhibit 15, R. 251) On the same date a Warranty Deed was executed and delivered from Fourth Party Defendant to Plaintiffs conveying to them the property referred to as tract 1 which was described in the Deed as the Northeast quarter of the Southwest quarter of Section 31, T35 S, R 7 W, Salt Lake Base and Meridian. (Exhibit 16, R. 254, 255)

During the month of August, 1958 the Plaintiff Fred N. Hobson and William Marsden met in the area between tracts 1 and 2 along with a Mr. Ralph Reynolds, an employee of Plaintiffs. (R. 140, 141) William Marsden, through the use of a hand held compass purported to show Plaintiff and his employee where the West boundary line of tract 1 was located. Stakes were driven along the purported boundary line by Mr. Reynolds at the direction of Mr. Marsden. Mr. Marsden also purported to show him a pile of rocks which he indicated was the Northwest corner of tract 1. (R. 149) Mr. Hobson concedes that

there was no dispute between he and William Marsden as to where the boundary line was at the time the stakes were driven. (R. 199)

It is significant to note that the record does not contain any evidence that William D. Marsden was acting as the agent of his wife, the Fourth Party Defendant Della D. Marsden, at the time he met with Plaintiff Fred N. Hobson and purported to advise him of the location of the boundary line nor was any finding of fact to this effect made by the Court.

Following the meeting on the property between Plaintiff Fred N. Hobson and William Marsden, a fence was constructed along the line in 1958. (R. 248) This fence line extended beyond the legal description of tract 1 and encroached onto tract 3 as shown in the diagram.

In the year 1964 Della D. Marsden conveyed the property referred to in the diagram as tract 3 to the Third Party Defendants. (R. 350) Thereafter, on September 15, 1965 the Third Party Defendants conveyed the same property to the Defendant Panguitch Lake Corporation. (R. 351, Exhibit 20)

In the spring of 1968 the Defendant Panguitch Lake Corporation, after having the property line surveyed, determined that the fence erected by the Plaintiffs encroached upon their property and had the same removed. (R. 353, 354)

During the summer of 1968 a meeting occurred at the disputed property line and those present included the Plaintiff Fred N. Hobson, two representatives of Pan-

guitch Lake Corporation, Oliver D. LeFevre and David Watson. (R. 356) Also present at the meeting was Bruce Whited, a licensed surveyor who had been retained by the Plaintiffs to survey the property for them in June of 1968. (R. 331) Mr. Whited had determined that the boundary line in the Deed from Della D. Marsden to the Plaintiffs was considerably to the East of the fence line which they had erected in 1958. (R. 332) He was also aware that Defendant Panguitch Lake Corporation had had a survey made to establish the correct boundary line. (R. 332) There was a slight variance between the two surveys which would have resulted in a discrepancy at the Southwest corner of approximately ten (10) feet and Mr. Whited advised Plaintiff Fred N. Hobson and Oliver D. LeFevre of Panguitch Lake Corporation of this variance. (R. 333)

Upon the suggestion of Mr. Whited, the Plaintiff Fred N. Hobson and Oliver D. LeFevre of Defendant Panguitch Lake Corporation agreed that the correct line should be established between the two surveys and the line was staked. (R. 334, 335; R. 261; R. 319, 320; R. 343, 344; R. 359, 360; R. 372) A fence was constructed along the new line by Defendant Panguitch Lake Corporation who has had possession of the property since that date. (R. 188)

At the conclusion of the trial the parties stipulated that the matter be submitted to the Court on written briefs and the Plaintiffs' brief was due on January 15, 1972 with the Defendants to file their briefs within 25 days thereafter. No brief was filed by the Plaintiffs and the Defendants have never been firmly apprised of the

legal theory or theories upon which Plaintiffs claim title to the property in question. Thereafter, on December 19, 1972 a Decision was rendered with Findings of Fact, Conclusions of Law and a Judgment and Decree signed by the Court on December 29, 1972. (R. 91, 98)

ARGUMENT

POINT I

THE TITLE TO TRACTS 1 AND 3 WAS VESTED IN DELLA D. MARSDEN AT THE TIME PLAINTIFFS PURCHASED THEIR INTEREST IN TRACT 1.

As was noted in the Statement of Facts, on November 1, 1957, William Marsden executed a Warranty Deed conveying title to tracts 1 and 3 to his wife Della D. Marsden which Deed was recorded on July 26, 1958. Finding of Fact No. 3 provides in part as follows:

> "That William Marsden executed a Warranty Deed which was recorded on July 30, 1958 in Book 111 at Page 569 of the Garfield County Records conveying to Della D. Marsden, the wife of the grantor, the above described property. *That prior to the date of said conveyance William Marsden had entered into an agreement for conveyance to Plaintiffs,* Fred N. Hobson and Mary L. Hobson, as joint tenants with full rights of survivorship and not as tenants in common, the Northeast Quarter of the Southwest Quarter of said Section 31. . . ." [Emphasis added]

The emphasized portion of the foregoing Finding is contrary to the testimony of Plaintiff Fred N. Hobson concerning this transaction. Mr. Hobson stated as follows:

"Q — When did you buy it?

A — I believe it was in 1958, in approximately August, the first 40, and then maybe a couple of weeks later the second 40. . . ." (R. 236, 237)

This date is further corroborated by the Sales Agreement dated September 2, 1958 (Exhibit 15) whereby Della D. Marsden, who owned the property at that time, agreed to sell tract 1 to the Plaintiffs.

The record is completely void of any evidence which would establish an agreement between Plaintiffs and William D. Marsden to purchase tract 1 prior to the date of the Sales Agreement, September 2, 1958. Further, any such purported agreement or finding of the same would be contrary to the provisions of the Statute of Frauds, Section 25-5-1, Utah Code Annotated, which provides as follows:

> "Estate or interest in real property. — No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

As can be seen by the foregoing, it is clear that at the time the Plaintiffs purchased their interest in tract 1, both it and tract 3 were owned by the Fourth Party Defendant, Della D. Marsden. As a consequence of this, any oral

agreement between Plaintiffs and William D. Marsden purporting to establish a boundary line between tracts 1 and 3 would be ineffective as no evidence was introduced or finding made to the effect that William D. Marsden was the agent of the property owner Della D. Marsden with the authority to enter into such a transaction.

POINT II

TITLE TO THE DISPUTED PROPERTY SHOULD BE QUIETED IN DEFENDANT PANGUITCH LAKE CORPORATION.

A—THE PLAINTIFFS' CLAIM TO TITLE TO THE PROPERTY CANNOT BE ESTABLISHED BY ADVERSE POSSESSION.

In order for a person to establish title to real property by adverse possession one must maintain open, notorious, continuous, exclusive and adverse possession of the property for a period of seven (7) years. See *Cooper v. Carter Oil Co.,* 7 Utah 2d 9, 316 P.2d 320.

In addition to the foregoing requirements, the claimant must have paid the taxes which have been levied on the property pursuant to the provisions of Section 78-12-12, Utah Code Annotated which provides as follows:

> "Possession must be continuous, and taxes paid.—In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law."

The Plaintiffs offered no evidence that they had paid real property taxes on the disputed property and no finding of fact that such taxes had been paid by them was made by the Court. To the contrary, there was evidence that the Defendant Panguitch Lake Corporation had paid the taxes on the disputed property. (R. 361)

B—THE PLAINTIFFS' CLAIM OF TITLE TO THE PROPERTY CANNOT BE ESTABLISHED BY THE DOCTRINE OF BOUNDARY BY ACQUIESCENCE.

For the purpose of this argument only, the Defendant Panguitch Lake Corporation will concede that William D. Marsden was the agent of and had the authority from the Fourth Party Defendant Della D. Marsden to agree with the Plaintiffs as to the location of the boundary line.

The Supreme Court of the State of Utah has set forth the requirements necessary in order for a person to establish title to a disputed area of property based upon the doctrine by acquiescence. In the case of *Fuoco v. Williams,* 18 Utah 2d 282, 421 P.2d 944, the Court stated as follows:

> "In former opinions this Court has required four prerequisites to establish a presumption of boundary by acquiescence. They are: (1) occupation up to a *visible line* marked by *monuments,* fences or buildings, (2) *mutual* acquiescence in the line as the boundary, (3) for a long period of years, (4) by adjoining land owners."

As was noted in the Statement of Facts, in 1958 the construction of a fence was commenced by the Plaintiffs

along the boundary line claimed by them pursuant to the agreement with William D. Marsden which was entered into in August of 1958. This fence line remained in existence until it was removed by Defendant Panguitch Lake Corporation in 1968. (R. 354) In 1968 the Defendant Panguitch Lake Corporation constructed a fence along the correct line as established by the surveyors and agreed to by the adjoining land owners. (R. 360)

Thus, the critical question for determination is whether the Plaintiffs' possession of the disputed property for a period of ten (10) years is sufficient to comply with the requirement that the boundary line be observed for a "long period of years."

In the case of *King v. Fronk,* 14 Utah 2d 135, 378 P.2d 893, the Supreme Court of the State of Utah discussed the question of what length of time was necessary to satisfy this requirement and stated as follows:

> "Boiled down, it seems to us that establishment of boundary by acquiescence may be predicated upon the existence of a visible monumented line persisting for at least 20 years or upwards, shown specifically or circumstantially in order to meet or exceed the requirements of acquiring rights by prescription. . . ."

The Court also indicated that it felt the seven (7) year period called for in title by adverse possession was not sufficient and stated as follows:

> "In practically all of the cases, it appears that more than 20 years has been the yardstick. In one case, dictum-wise, Mr. Justice Wolfe suggested that the adverse possession statute calling for 7 years condi-

> tional enjoyment should be the hallmark for boundary by acquiescence cases. This period is unrealistic. It fails to recognize that under the adverse possession statute, — strictly a limitations of action statute, one must have paid taxes, improved the property and the like and claimed it continuously for 7 years. To assert that a 7-year persistent fence, nothing more, could ripen into title, is to overlook the following: (1) that it would establish *title* in the fencemaker, (2) without his having complied with the sanctions of the adverse possession statute, which does not give title but only a defense against others who claim it."

As it was pointed out in the *King* case, supra, the Supreme Court of the State of Utah has not clearly established what length of time is necessary to have the doctrine of boundary by acquiescence become applicable. However, all cases, both before and since the decision, wherein the doctrine has been found to be applicable, have involved periods of 20 years or more. See *Johnson v. Sessions,* 25 Utah 2d 133, 477 P.2d 778 (21 years); *Motzkus v. Carroll,* 7 Utah 2d 237, 322 P.2d 391 (45 years); *Willie v. Local Realty Company,* 110 Utah 523, 175 P.2d 718 (59 years); *Ekberg v. Bates,* 121 Utah 123, 239 P.2d 105 (50 years); *Kanus v. Smith,* 20 Utah 2d 444, 354 P.2d 124 (20 years); *Johnson Real Estate Company v. Nielson,* 10 Utah 2d 380, 353 P.2d 918 (25 years); *Provonsha v. Pitman,* 6 Utah 2d 6, 305 P.2d 486 (58 years). A period of nine (9) years was held to be insufficient in the case of *Brien v. Smith,* 100 Utah 213, 112 P.2d 145.

In oral argument presented to the Court at the time of the hearing of a Motion for a Judgment on the Pleadings, the Plaintiffs' attorney indicated that they re-

lied upon the following language from the case of *Brown v. Milliner,* 120 Utah 16, 232 P.2d 202, in support of their claim of title to the disputed property. The Court stated as follows:

> "A review of the Utah cases involving boundary disputes reveals that it has long been recognized in this State that when the location of the true boundary between two adjoining tracts of land is unknown, uncertain or in dispute, the owners thereof may, by parol agreement, establish the boundary line and thereby irrevocably bind themselves and their grantees."

The Plaintiffs' contention being that at the time of the meeting between Plaintiff Fred N. Hobson and William Marsden in August of 1958, the boundary line was orally established by them and no requirement of acquiescence in the same for a "long period of years" need be shown.

However, from a reading of the *Brown* case, it is apparent that the Court in using the foregoing language was discussing the doctrine of boundary by acquiescence and that the quoted language must be read in context. In outlining the issues presented by the case, the Court stated at the outset as follows:

> ". . . The appellant claims title to the land in dispute under a deed while the respondent claims title under the doctrine of boundary by acquiescence and by adverse possession. . . ."

In further discussing the doctrine the Court stated as follows:

> "We have further held in this state that in the absence of evidence that the owners of adjoining property or their predecessors in interest ever ex-

> pressly agreed as to the location of the boundary between them, if they have occupied their respective premises up to an open boundary line visibly marked by monuments, fences or buildings for a long period of time and mutually recognized it as the dividing line between them, the law will imply an agreement fixing the boundary as located, if it can do so consistently with the facts appearing, and will not permit the parties nor their grantees to depart from such line. Holmes v. Judge, 31 Utah 269, 87 P. 1009. *This rule is sometimes referred to as the doctrine of boundary by acquiescence. . . .*" [Emphasis added]

The *Brown* case was cited with approval in the case of *Blanchard v. Smith,* 123 Utah 119, 225 P.2d 729, which held that even though an oral agreement between adjacent property owners can fix a boundary line, it must be acquiesced in for long period of years. In addressing itself to this question, the Court stated in part as follows:

> "We repeatedly have held that neighbors, by oral agreement may establish a common boundary which, after sufficiently long acquiescence, cannot be established. . . ."

Also, in the case of *Davis v. Riley,* 20 Utah 2d 325, 437 P.2d 453, Justice Callister, in a concurring opinion, discusses the doctrine of boundary by acquiescence and states as follows:

> "*This doctrine is premised on either an express parol agreement by adjoining owners fixing the boundary or the court will imply such an agreement* by indulging 'in a fiction that at some time in the past the adjoining owners were in dispute or uncertain as to the location of the true boundary and that they settled their differences by agreeing

upon the fence or other monument as the dividing line between their properties.' [Emphasis added]

. . . .

. . . *The doctrine of boundary by acquiescence cannot be utilized as a subterfuge to avoid compliance with the statutory provisions for adverse possession.*" [Emphasis added]

The "long period of years" rule is obviously designed to insure that people dealing with either adjacent land owner may be placed on notice of any discrepancy in the boundary line as contrasted to the legal description by physically observing a long established fence line or other monuments obviously separating the properties. To allow adjoining land owners to orally establish the boundary line between the tracts without the long acquiescence required by the doctrine, would lead to uncertainty and much controversy when questions arose concerning the location of the boundary line.

A further ground upon which Plaintiffs' claim of title to the property based upon the doctrine of boundary by acquiescence must fail is the requirement that there must be a dispute or uncertainty as to the location of the boundary line between the adjacent owners prior to the establishment of the permanent boundary and that if it is marked by mutual mistake, it may be corrected. The latter part of this was referred to by the Court in the *Blanchard* case, supra, and the Court quoted with approval from 8 Am. Jur. 2d, *Boundaries,* Section 77, p. 801, which provides as follows:

"If, however, the parties undertake by a parol agreement to fix the location of a boundary line under the belief that they are fixing the true bound-

> ary line, when in fact, it is not, their agreement is not binding and may be set aside by either party upon the discovery of the mistake. . . ."

It is apparent that William Marsden and Plaintiff Fred N. Hobson, through a mistake, established a boundary line which did not conform to the actual boundary line between the two tracts in question and upon discovery of this mistake by Panguitch Lake Corporation in 1968, they were entitled to correct the same which was done.

Also, in the case of *Carter v. Linder,* 23 Utah 2d 204, 460 P.2d 830, the Court discussed the proposition that a dispute or uncertainty must exist between the adjacent land owners in order for the doctrine of boundary by acquiescence to be applicable. The Court stated as follows:

> ". . . Without a dispute and uncertainty as to the true location of the boundary line there can be no boundary line by acquiescence under an oral agreement between adjoining property owners. . . ."

As was noted in the Statement of Facts, the Plaintiff Fred N. Hobson testified that there was no dispute between himself and William Marsden as to the location of the boundary line and he was merely relying upon Mr. Marsden's hand-held surveying technique to establish the same. (R. 199, R. 237, 238) Further, there was no finding by the Court that such a dispute existed at the time of the meeting in August of 1958.

POINT III

IN 1968 THE PLAINTIFFS AND DEFENDANT PANGUITCH LAKE CORPORATION ORALLY AGREED TO THE ESTABLISHMENT OF A BOUNDARY BETWEEN TRACTS 1 AND 3.

For the purpose of this agreement it must be assumed that adjacent land owners may, by oral agreement, establish a boundary line between the tracts without the requirement that the same be marked and acquiesced in for a "long period of years," as contended by the Plaintiffs.

On June 19, 1968 a meeting took place on the disputed boundary line wherein the following persons, among others, were present: Plaintiff Fred N. Hobson, Oliver D. LeFevre on behalf of Defendant Panguitch Lake Corporation, David Bruce Whited, a surveyor hired by the Plaintiffs, Marvin Rice who purchased property in the disputed area from Plaintiffs, and David Watson, an employee of Defendant Panguitch Lake Corporation. At the time of this meeting, the fence line established by the Plaintiff Fred N. Hobson in 1958 had been removed and the correct boundary line had been located by a surveyor retained by Panguitch Lake Corporation and Mr. Whited who had surveyed the boundary line for the Plaintiffs. The following is the testimony of each of the persons present at the meeting concerning the conversation which took place as a result of the surveys:

FRED N. HOBSON:

> "Q—Did you agree to assist Mr. LeFevre of the Panguitch Lake Corporation putting in the fence line in accordance with Mr. Whited's survey line?

A—If that can be proven that is correct, I would do anything fair. I said the line on the other side of the fence is mine. But I also said that the surveyor, if he says that's the line, that's the line, but I didn't concede any land on either side of the line that I bought from William B. Marsden." (R. 261)

MARVIN RICE:

"Q—Tell me what was said by each party.

A—Well, I don't really recall Mr. LeFevre saying anything. Mr. Hobson said, 'Well, if this is the fence line, this is it,' and he says, 'I want a very good fence put up,' he stressed this very much, he said he wanted a good fence put up and that he would pay half of the cost and half of the help in assembling the fence on this line.

Q—Did he say where the fence was to go?

A—On this survey line.

Q—That is on this Whited survey line?

A—On the Whiting survey line. [Whited]

Q—Was anything further said at that time by either of these parties about this disputed boundary line?

A—Well, I know him and Mr. LeFevre shook hands and said there would be no hard feelings." (R. 319, 320)

DAVID BRUCE WHITED:

"Q—Regardless of what the line was, they were talking about the construction of another fence; is that correct?

A—Mr. Hobson said if the fence had to be moved, he'd help build it.

MR. CHAMBERLAIN: If the fence had to be moved; is that right?

A—The reason for the—the reason that the agreement on the line was, is that there was enough discrepancy in the two surveys that if I continued on my survey, it would be meaningless in order to tie down the location of the fence, so I went to Mr. Hobson and I went to Mr. LeFevre and I said, 'Now, this is where Mr. Plat puts the property line?' And I said, 'This is where I put it,' and I said, "there's enough discrepancy that if I continue on this, I'm going to be some eight or ten feet off,' even though the point we were looking at we were within 18 inches. It was 18 inches where we were looking at it, and it was approximately a foot or less than a foot at the corner. So in order to establish the location of that line, I was going to survey and make my further ties, then I got them to agree on it and then I drove the stake in the middle and then continued on with the survey." (R. 343, 344)

MR. LE FEVRE:

"Q—So Mr. Whited, who was Mr. Hobson's surveyor, was better for you than was your own; is that correct?

A—In this particular point where the transit is set up.

Q—Okeh, Go ahead.

A—And he says, 'What can we do,' and I said, 'Let's split the difference.'

THE COURT: Who was that?

A—Mr. Fred Hobson. He said, 'What can we do,' and I said, 'Let's split the difference.'

Q—What did he say to that?

A—And he was agreeable to this.

Q—Was anything further said about the establishment?

A—. . . and Fred said, 'I will send a man to help you put this new fence according to the new line we established,' and then he mentioned something to Mr. Rice about, 'You will have to move these other lots back' or something, that were in question." (R. 359, 360)

MR. WATSON:

The parties stipulated that if Mr. Watson were called to testify, his testimony would be the same as that of Mr. LeFevre concerning the meeting in question. (R. 372)

As can be seen by the foregoing, it is apparent that a meeting did take place on June 19, 1968 wherein the parties agreed to establish the disputed boundary line between tracts 1 and 3 based upon the surveys performed for the parties and further agreed to construct a fence along this line. The fence was constructed immediately following this meeting by Defendant Panguitch Lake Corporation who has had possession of the disputed property since that date. (R. 360) Finding of Fact No. 10 states, in effect, that any conduct on the part of Plaintiffs subequent to the meeting with William D. Marsden in 1958 did not constitute a reconveyance or relocation of the line established at that time. This so called finding is in reality a conclusion of law which is not supported by applicable legal principles and the facts upon which it is purportedly based and which have been set forth above clearly would not support the same.

Thus, if in fact the boundary line was established by the meeting between William Marsden and Plaintiffs in August of 1958, it was relocated by the meeting of June 19, 1968 and title to the disputed property should be quieted in Defendant Panguitch Lake Corporation.

POINT IV

DEFENDANT PANGUITCH LAKE CORPORATION IS ENTITLED TO RECOVER DAMAGES AND ATTORNEY'S FEES FROM THIRD PARTY DEFENDANTS.

The trial of the case which was held on November 5 and December 15, 1971 was limited to the issues concerning the location of the boundary line in dispute. (R. 85, 135) Notwithstanding this, at the time the Decision was rendered by the Court, the same denied the claim of the Defendant Panguitch Lake Corporation for damages and attorney's fees against the Third Party Defendants for breach of the covenants contained in the Warranty Deed. (R. 97)

Thereafter, the Defendant Panguitch Lake Corporation made a Motion to amend the Findings of Fact and Judgment and to make additional Findings of Fact pursuant to the provisions of Rules 52 and 59 of the Utah Rules of Civil Procedure. (R. pp. 99-102) This Motion was heard by the Court and on December 13, 1973 an Order was entered which provided in part as follows:

> ". . . [T]he court holds that the reduction in purchase price shall be determined by the agreed price per acre paid by Panguitch Lake Corporation as per agreement of September 15, 1965.

The costs and attorney's fees sought by the Third Party Defendants are denied."

By the Warranty Deed dated September 15, 1965, the Third Party Defendants conveyed title to the property in question, including the disputed area, to the Defendant Panguitch Lake Corporation. (Exhibit 20) The law of the State of Utah is to the effect that if a grantor conveys legal title to property to a grantee by Warranty Deed and title in the grantee is challenged or found to be defective, the grantee is entitled to recover from the grantor damages for the breach which include compensation for any property lost and costs and attorney's fees incurred in connection with the defense of the title. In this regard, the Supreme Court of the State of Utah in the case of *Creason v. Peterson,* 24 Utah 2d 305, 470 P.2d 403, stated as follows:

> ". . . The majority rule, with which we are in accord, is that there is a breach of warranty when it is shown that the grantor did not own the land that he purported to convey by the warranty deed description. The covenants involved are of seizin and of good right to convey the property, which for the purposes considered in this case, are synonymous; and the breach thereof is made out by a showing that those rights did not exist in the grantor, and it is not necessary to show an actual eviction or threat thereof. However, even though the grantee is entitled to the peaceable possession and enjoyment of the property he purchases in accordance with the warrants, he is entitled only to the damage he suffers as a result of the breach thereof, but this includes taking such measures as are reasonable and necessary to clear up any difficulty which would represent a substantial flaw in his title.
>
> . . . .

> . . . As above noted, inasmuch as it is shown that there was a technical defect in the title, the plaintiffs would be justified in doing whatever was reasonable and prudent to clear it up; and if this involved the necessity of employing an attorney, the reasonable expense therefor would be compensable. . . ."

Other cases setting forth this proposition are: *VanCott v. Jacklin,* 63 Utah 412, 266 P. 460 and *Lowe Co. v. Simmons Warehouse Co.,* 39 Utah 359, 117 P. 874.

In accordance with the legal principles set forth above, the Defendant is entitled to recover reasonable attorney's fees and costs in connection with the defense of the title from Third Party Defendants and if the title to the property is quieted in the Plaintiffs, it is also entitled to recover damages from Third Party Defendants as a result of the loss of the same.

CONCLUSION

The evidence clearly demonstrates that at the time the boundary claimed by the Plaintiffs was purportedly established, the person with whom they dealt, to-wit: William Marsden, had no ownership interest in the property and no authority from the true owner to enter into such an agreement.

The Plaintiffs have failed to pay taxes on the disputed property and, thus, may not claim title to the same by adverse possession. The possession of the property by the Plaintiff for a period of ten (10) years is an insufficient length of time to comply with the requirement that

the same be held for a "long period of years." Further, there was no dispute concerning the boundary line purportedly established and the same was located by a mutual mistake and may be set aside.

If the oral agreement purporting to establish the boundary line in 1965 is held to be sufficient, the oral agreement re-establishing the same in 1968 is likewise sufficient and title to the property should be quieted in Defendant Panguitch Lake Corporation.

As a result of the breach of the covenants contained in the Warranty Deed, the Defendant Panguitch Lake Corporation is entitled to recover attorney's fees in connection with the defense of the title and damages for the loss of the property in the event title to the same is quieted in Plaintiffs.

Respectfully submitted,

J. ANTHONY EYRE
Kipp and Christian
520 Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendants, Third-Party Plaintiff & Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two copies of APPELLANTS BRIEF to Ken Chamberlain, Attorney for Plaintiffs/Respondents, 76 South Main Street, Richfield, Utah; Thorpe Waddingham, Attorney for Third-Party Defendants/Respondents, Delta, Utah and to Paul M. Hansen, Attorney for Fourth Party Defendant/Respondent, 817 Oak Street, Ogden, Utah, this 30th day of May, 1974.

J. Anthony Eyre

J. Anthony Eyre